

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Indianapolis, IN

INTERSTATE BRANDS CORPORATION¹

and

Case 25-RC-10075

TEAMSTERS, LOCAL UNION NO. 135, a/w
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS²

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held December 14, 2001, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

¹ The name of the Employer appears as stipulated by the parties.

² The name of the Petitioner has been corrected to reflect its full legal name.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time clerks employed by the Employer at its East 53rd Street thrift store located in Anderson, Indiana; BUT EXCLUDING all lead clerks, all sales employees, professional employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

The unit found appropriate herein consists of approximately 5 employees for whom no history of collective bargaining exists.

I. STATEMENT OF FACTS

The Employer, Interstate Brands Corporation (hereinafter referred to as the "Employer") is engaged in the manufacture and wholesale distribution of bread and cake items to supermarkets and convenience stores, including products sold under the "Wonder Bread" and "Hostess" trade names. Its Indiana facilities include a central bakery in Indianapolis and 19 retail stores located throughout the central part of the state. Baked goods whose shelf-life has expired is removed from supermarket and convenience store shelves and transported to the 19 "thrift" stores where the baked goods is sold to the retail public at a presumably reduced cost.

The Petitioner seeks an election within a unit comprised of the approximately 5 store clerks employed by the Employer at its 912 East 53rd Street thrift store (hereinafter referred to the "53rd Street store") located in Anderson, Indiana. The Employer contends that only a multi-store unit which includes its second thrift store in Anderson (located at 1701 Silver Street and hereinafter referred to as the "Silver Street store") constitutes an appropriate unit. Additionally, the Employer maintains that each lead clerk employed at each store should also be included in the unit, on grounds that they share a community of interest with unit members. The Petitioner contends that the single store is a presumptively appropriate unit and has not been so effectively merged with the Silver Street store as to destroy its separate identity. The Petitioner also asserts that lead clerks are supervisors within the meaning of Section 2(11) of the National Labor Relations Act (hereinafter referred to as the "Act") and therefore must be excluded from the unit.

The 53rd Street facility employs six individuals: three full-time clerks, two part-time clerks and, a lead clerk.³ The Silver Street facility employs four persons: one full-time clerk, two part-time clerks, and a lead clerk. The lead clerks work 40 hours per week; full-time clerks approximately 30 hours per week; and part-time clerks about 18 hours per week. The two stores are approximately seven and one-half miles apart.

³ The lead clerk at the 53rd street store is Nellie Gist, while the lead at Silver Street is Jannie Boyer.

All retail stores are overseen by the Retail Sales Manager for the Indianapolis bakery, whose office is located at the bakery. Also located at the bakery is a Human Resource department which maintains all employee personnel records and establishes uniform personnel policies, wage scales, and benefit plans applicable to all of the company's non-unionized stores.⁴ Uniform policies and procedures govern all of the thrift stores, and are established by the Retail Sales Manager.

In addition to baked goods produced by the Indianapolis bakery, the thrift stores also sell grocery products from third-party vendors such as Coca-Cola and potato chips. The interior of the stores are arranged much like miniature convenience stores, with shelves displaying the various products for sale. Included among the duties of both the clerks and lead clerks are opening and closing the stores; waiting on customers; counting cash register receipts and preparing bank deposits at the close of the store; removing stale product from shelves and stocking shelves with newly received goods; and maintaining the cleanliness of the facility. The 53rd Street store is open Monday through Saturday from 9:00 AM to 7:00 PM and Sunday from 11:00 AM to 4:00 PM, while the Silver Street store is open Monday through Saturday from 8:30 AM to 7:00 PM.

Lead clerks perform duties and exercise authority that clerks do not. Clerk-applicants for employment complete applications at the stores and are interviewed by the stores' lead clerks who subsequently discuss the applicants with the Retail Sales Manager. The lead clerks recommend applicants for hire, and according to the Retail Sales Manager, he adopts the recommendations of the lead clerks in 75% of the cases. Lead clerks also determine the work hours of the clerks at their stores. The Retail Sales Manager determines the total number of manhours available for each store, based upon its sales volume; but it is the lead clerk who decides which hours and days of the week each clerk shall work. Lead clerks possess the authority to establish and change work schedules without prior consultation or approval from the Retail Manager. Additionally, the lead clerks possess the authority to authorize absences and approve vacation requests from the clerks. Lead clerks train new hires. They also review and verify the accuracy of the clerks' time cards before the cards are sent to the bakery for payroll preparation. Where, for example, a clerk has forgotten to clock in or out, the lead clerks can authorize payment by writing in the correct time on the card. Lead clerks also order product for their stores.

Lead clerks correct the work of the clerks and counsel them about work deficiencies without prior consultation or approval of the Sales Manager. When a lead clerk considers more formal discipline necessary, she discusses the employee misconduct with the Retail Manager. He and the Human Resource department ultimately determine the appropriate discipline. In the case of a written reprimand, for example, the Human Resource department may suggest the appropriate wording of the reprimand or may actually draft it and forward it to the lead clerk for distribution to the affected employee. The Employer does not utilize any formal performance

⁴ The employees of several other of the Employer's retail stores are represented by labor organizations, one of which is the Petitioner which represents employees employed at three other stores.

evaluation system, so lead clerks do not prepare any written performance appraisals of clerks' work. Lead clerks possess the authority to resolve minor disputes or complaints from the clerks. If a dispute is not within the lead clerk's realm of authority or expertise to resolve, the lead clerk refers the problem to the Retail Sales Manager.

Lead clerks from all of the stores attend bi-annual meetings with the Retail Sales Manager at the Indianapolis office. Lead clerks are trained concerning interview procedures and techniques, and receive training concerning the ordering of product for their stores. There is no evidence that clerks receive such training.

Of the two facilities in question, the Silver Street facility has been in existence longer, with the 53rd Street store having opened about three years ago. When the 53rd Street store opened, two Silver Street employees permanently transferred to it. Although there was testimony that a clerk from the 53rd Street store temporarily transferred to Silver Street, and that two clerks from Silver Street have worked at the 53rd Street store, the Employer offered only vague testimony on the topic of transfers. The Sales Manager was able to testify only that temporary transfers have occurred "in the past" and "infrequently." He was unable to specify the year(s) in which transfers occurred; the frequency of any transfers; or their duration. Nor did the Employer offer any documentary evidence to provide specific information concerning temporary and permanent transfers.

Clerks earn about \$10.50 an hour and the lead clerks earn a dollar an hour more. Employees in both classifications are paid overtime for hours worked in excess of 40 per week. Additionally, when a clerk substitutes for a lead clerk, the clerk is compensated at the higher rate of pay. As previously mentioned, lead clerks and clerks of the Employer's non-unionized stores receive the same fringe benefits, including health insurance, a 401(k) plan, vacation entitlement, and sick leave benefits.

Several of the 19 thrift stores are currently covered by collective bargaining agreements. Some of the stores were combined by the Employer and the unions involved, to form multi-store units, while other contracts cover single-store units. This evidence has little, if any, probative value to the case at hand since none of the combined units were the product of a Regional decision and direction of election. The stores were combined by the mutual consent of the parties.

II. DISCUSSION

A. The Single Facility Issue

Under Section 9(b) of the Act, the Board has broad discretion to determine "the unit appropriate for the purposes of collective bargaining" in each case "in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act," NLRB v. Action Automotive, Inc., 469 U.S. 490, 494-97 (1985). The Board's discretion extends to selecting an appropriate unit from the range of units which may be appropriate in any given factual setting; it

need not choose the most appropriate unit, American Hospital Association v. NLRB, 499 U.S. 606, 610 (1991); P.J. Dick Contracting, Inc., 290 NLRB 150, 151 (1988).

When an employer operates multiple facilities, a single-facility unit is presumptively appropriate for purposes of collective bargaining, unless a functional integration between two or more of the facilities can be shown, Globe Furniture Rentals, Inc., 298 NLRB 288 (1990). The party seeking to rebut the presumption of a single facility unit must show that the day-to-day interests of the employees of one facility have merged with those of the other facility, Beckett Aviation Corporation, 254 NLRB 88, 89 (1981). To determine whether the presumption has been negated, the Board analyzes such factors as the centralized administration and control of labor relations, the skills and work functions of the employees, the commonality of daily supervision, the similarity of employees' terms and conditions of employment, the extent of operational and employee interchange, and the geographical proximity of the facilities, D&L Transportation, Inc., 324 NLRB 160, 161 (1997); Globe Furniture Rentals, Inc., *Supra*.

In the present case, there exists a centralized administration over the operations of all thrift stores, and employee wages, benefits and other terms and conditions of employment are uniform for all stores. Common indirect supervision exists in the person of the Retail Sales Manager. The skills and work functions of the clerks are essentially the same, as are those of the lead clerks. Other factors, however, such as separate local supervision; the relative autonomy of that supervision; the lack of meaningful contact and interchange among employees of the two stores; and the geographic distance between stores, fails to establish that the employees of the two stores have become so effectively merged that they have lost their separate identity, J & L Plate, Inc., 310 NLRB 429 (1993); Foodland of Ravenswood., 323 NLRB 665 (1997).

The Board has recognized that certain factors such as common daily supervision have a greater impact upon creating a community of interest among employees than other factors such as common indirect supervision. Common daily supervision has a greater impact upon the creation of a community of interest than other factors because it has a direct impact upon employees work lives, and employees with different supervisors may not necessarily share similar problems or concerns, D & L Transportation, Inc., *Supra*; Towne Ford Sales, 270 NLRB 311 (1984). In the case at hand, the lead clerks enjoy autonomy in their selection of applicants for hire; their scheduling of employees' work hours; their approval of leave requests, their issuance of minor discipline, and their ability to resolve employee conflicts and complaints.

The total absence of contact between the two groups of clerks during the course of performing their daily activities also contributes to a local, rather than multi-store community-of-interest. The insignificant degree of employee interchange which has occurred between stores also fails to support a multi-store unit. Lastly, the geographic distance between stores mitigates against a multi-store unit, AVI Foodsystems, Inc., 328 NLRB 426 (1999); Red Lobster, 300 NLRB 908 (1990).

Accordingly, it is concluded that the clerks employed at the Employer's store located at 912 East 53rd Street, Anderson, Indiana, constitute a unit appropriate for purposes of collective bargaining.

B. The Status of Lead Clerks

Section 2(11) of the Act defines a supervisor as a person who independently exercises any of the twelve powers listed therein, or who possesses the authority to effectively recommend such personnel actions, if in doing so, s/he exercises independent judgment. Section 2(11) is interpreted in the disjunctive, so the possession of any one of its enumerated powers confers supervisory status, NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571 (1994); Ohio Power Co. v. NLRB, 176 F.2d 385, 24 LRRM 2350 (6th Cir., 1949) cert. denied 338 US 899 (1949); Queen Mary, 317 NLRB 1303 (1995).

In the present case, it is undisputed that the lead clerks possess the power to effectively recommend the hire of employment applicants. They also have the authority to issue minor discipline in the form of oral counselings of employees. They exercise independent judgment in their selection of the hours and days of the week which they assign clerks to work. The record indicates that the Retail Sales Manager informs the lead clerks of the number of manhours allocated to each store during a given time period, and there is apparently a practice of allocating 30 hours of work per week to full-time clerks and 18 hours to part-time employees, but beyond these two strictures, the lead clerks are free to select the hours and days of the week each clerk shall work. Lead clerks also possess the power to approve or disapprove of clerks' absences from work. The record also indicates that the lead clerks have meaningful input into disciplinary decisions more severe than oral counselings, although the record is not sufficient to support a conclusion that lead clerks effectively recommend such discipline.

In addition, a finding of supervisory status in this case is bolstered by the secondary indicia of supervisory status exhibited by the lead clerks. A finding that lead clerks are not supervisors would effectively leave the stores unsupervised. The record indicates that although the Retail Sales Manager speaks to the lead clerks by phone weekly, he does not visit each store on a weekly basis. Lead clerks are also paid substantially more than clerks, the evidence being that they are paid at least a dollar an hour more. Finally, the lead clerks attend special meetings at the bakery at least twice per year. There is no evidence that any clerk is included in such meetings.

In light of the above, it is concluded that the lead clerks at the Silver Street and 53rd Street stores are supervisors within the meaning of Section 2(11) of the Act. Since a unit comprised only of clerks employed at the 53rd Street store has been found appropriate, the lead clerk of that store shall be excluded from that unit.

III. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees in the unit who are engaged in an

economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the unit who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are former unit employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Teamsters, Local Union No. 135, a/w International Brotherhood of Teamsters.

IV. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices, Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

V. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. North Macon Health Care Facility, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 25's Office, Room 238, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204-1577, on or before **January 11, 2002**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by January 18, 2002.

DATED AT Indianapolis, Indiana, this 4th day of January, 2002.

/s/ Roberto G. Chavarry

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